

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of
Public Interest Obligations
of TV Broadcast Licensees

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MM Docket 99-360

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION**

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SUMMARY

This proceeding, which on the face of it is about the public interest obligations imposed on television broadcasters, ought to be about a lot more than the Commission lets on in the Notice of Inquiry ("NOI"). The Notice is occasioned by the Commission's determination to delineate the public interest obligations of the new digital television licensees, as well to re-examine the public interest obligations of all television broadcasters. So the Commission recites all the various programming and service obligations that currently apply to broadcast licensees—from coverage of community issues to political broadcasting requirements to children's programming requirements. And it suggests a myriad of obligations that could be applied in the future, from mandatory free air time for political candidates to targeted neighborhood weather forecasts. In a very open-ended fashion, the agency invites comment on these and any and all other potential public interest obligations.

What is so striking about the Notice, though, is what it doesn't ask, or even mention. There is virtually no discussion of the current marketplace environment for the mass media industry and what this environment, with its multiplicity and diversity of sources of information, means for the continuing application of public interest programming obligations. There is no discussion concerning the impact of "convergence" in a digital world on the public interest obligation question. The Commission focuses only on digital broadcasters as if digital cablecasters, digital direct satellite broadcasters, and digital webcasters—indeed, the Internet—do not exist. And, finally, and most striking, there is not a word about the relevance of the First Amendment to the Commission's inquiry.

The Commission may have its reasons for putting out such a cabined notice. But PFF believes that the failure to address, or at least to put on the table for others to address, these broader, more fundamental, issues is a mistake. This proceeding, spurred by the transition to digital television technology and at the dawn of the digital revolution, should be forward-looking.

A new First Amendment paradigm is needed for the digital age. The scarcity rationale upon which *Red Lion* relied so heavily in sanctioning a differential First Amendment regime for broadcasters, one in which they enjoy less First Amendment protection than print, cable, and other media, is now obsolete. The Commission itself has documented the monumental technological and industry changes which have occurred in the last three decades which have led to an abundance of speech outlets.

The phenomenon of convergence has also rendered obsolete a regime in which differential content regulation is applied based on the technology used to deliver the content. In the age of streaming video and audio on the Internet and other digital technologies, it is rapidly becoming meaningless to differentiate the "programming" that we receive based on what name we give the device—whether a "computer" or "television"—we use to view the content. One only needs to read the section of the Commission's most recent *Video Programming Report* entitled "Internet video," with its

description of Broadcast.com, TV on the Web, and others, to grasp the convergence point. Although some may advocate such an approach, it is almost inconceivable that the Commission would consider imposing on "Internet video" and other new technologies, whether wireless or not, the same type of public interest programming requirements that it proposes to continue for broadcasters. In a proceeding at the heart of the digital convergence revolution, the Commission simply should not ignore the question of whether any proposed public interest content requirements for broadcasters or other information disseminators are now impractical and unwise, even apart from their invalidity under the First Amendment.

Finally, it is likely that the public interest standard is unconstitutional as a standardless delegation of authority by Congress. For a delegation of congressional authority to be constitutional, the Supreme Court requires that the statute set forth "an intelligible principle" to guide the agency. We are aware that sixty years ago Justice Frankfurter declared in *FCC v. Pottsville Broadcasting Co.* that the Communications Act's "public interest" criterion "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." Perhaps. But in what ought to be a forward-looking proceeding, it is appropriate to ask anew whether, in a radically different environment, the "public interest" standard is indeed sufficiently "concrete." Congress should give the agency more intelligible guidance, or the Court may decide that a standard which has no more meaning than what any three commissioners say it means on any given day is a delegation that fails to pass muster under a constitutional system based on separation of powers.

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I. INTRODUCTION

The Progress & Freedom Foundation ("PFF" or "Foundation") is a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy. PFF's research and analysis have focused heavily on issues related to the deployment of broadband digital communications and the benefits to the American Public which will flow from widespread deployment and availability of digital communications services.¹

A recent example of our research work is PFF's *Digital Economy Fact Book*,² released in August 1999. This book contains a wealth of information concerning the growth of the telecommunications and information technology

¹ See especially Comments of The Progress & Freedom Foundation, CC Docket 98-146, September 14, 1998; see also Jeffrey A. Eisenach, Testimony Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, (April 22, 1998); Randolph J. May, "Putting Consumers First: Turning the Corner on Long-Distance Competition," *Progress on Point 7.1*, (February 2000); Randolph J. May, "On Unequal Playing fields: The FCC's Broadband Schizophrenia," *Progress on Point 6.11* (December 1999); Jeffrey A. Eisenach, "Into the Fray: The Computer Industry Flexes Its Muscle on Bandwidth," *Progress on Point 5.9* (December 1998); and, Donald W. McClellan, Jr., Esq., "A Containment Policy for Protecting the Internet from Regulation: The Bandwidth Imperative," *Progress on Point 4.5* (August 1997).

sector, including, of course, the Internet. It is a useful compendium of information concerning the impact of the digital revolution on various aspects of our daily lives.

In the Notice of Inquiry in this proceeding, the Commission solicits public comment on the public interest obligations of broadcasters in the digital age.³ The Commission observes that “[t]he discussion of television broadcasters’ public interest obligations has been renewed by their transition from analog to digital television (DTV) technology.”⁴ The Commission points out that DTV broadcasters will have the technical and regulatory flexibility to broadcast high definition television programming or to “multicast” by simultaneously providing multiple channels of standard digital programming and/or HDTV, while at the same time “datacasting.” Such “datacasting” might involve provision of stock quotes, weather, or other information, or other forms of “interactive TV.”⁵

The Notice explains that in establishing the statutory framework for the transition to DTV, Congress directed the Commission to grant any new DTV licenses to existing television broadcasters. And the Commission reminds that, in doing so, Congress stated that “[n]othing in this section shall be construed as

² See Erran Carmel, Jeffrey A. Eisenach, and Thomas M. Lenard, *The Digital Economy Fact Book* (Washington, DC: The Progress & Freedom Foundation, 1999).

³ Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, FCC 99-390, released December 20, 1999 (hereinafter sometimes “NOI”).

⁴ NOI, at para. 3.

⁵ NOI, at para. 3. The Commission is required by Section 336(e) of the Communications Act to collect fees from the DTV broadcasters that offer these so-called “ancillary or supplementary services.” 47 U.S.C. § 336(e). The fees must be set to recover for the public an amount that, to the extent feasible, equals the amount that would have been recovered had such services been licensed pursuant to auction. *Id.*

relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity.”⁶

II. WHAT THE NOTICE ASKS—AND, MORE IMPORTANTLY, FAILS TO ASK

Perhaps typical of a Notice of Inquiry, as opposed to a Notice of Proposed Rulemaking, the Commission’s solicitation of comment in some respects is quite open-ended.⁷ So, while the Commission recites all the various programming and service obligations that currently apply to broadcast licensees, from coverage of community issues to political broadcasting requirements to children’s programming requirements, and a myriad of obligations that might be applied in the future—such as free air time for political candidates—the agency invites any and all ideas for other requirements as well.

For example, the Commission recites the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters recommendation that the Commission adopt a set of mandatory minimum public interest obligations, and it asks a series of questions concerning how such minimum obligations might be defined. The Commission takes special note of the Advisory Committee’s recommendation that broadcasters consider making available free air time, including Vice President Gore’s October 29, 1999 letter urging such

⁶ 47 U.S.C. § 336 (d).

⁷ In this sense, it is true to the Commission’s earlier promise “to collect and consider all views.”; NOI, at para. 5, quoting *Advanced Television Systems And Their Impact Upon The Existing Television Broadcasting Service*, 12 FCC Rcd 12809, 12810-12811 (1997).

consideration.⁸ It asks whether such a free-time offering should be made mandatory or left up to the broadcasters to volunteer.⁹

What is so striking about the Notice, though, is what it does not ask, or even mention. There is virtually no discussion of the current marketplace environment for the mass media industry and what this environment, with its multiplicity and diversity of sources of information, means for the continuing application of public interest obligations. There are only a few oblique references to such questions, such as when the Commission asks, “[a]re there sufficient marketplace incentives to ensure the provision of programming responsive to community needs, obviating the need for additional requirements?”¹⁰

There is no discussion concerning the impact on the public interest obligation question of “convergence” in a digital world. The Commission focuses only on digital television broadcasters as if digital cablecasters, digital direct satellite broadcasters, and digital webcasters do not exist.

And, finally, and most striking, there is not a word about the relevance of the First Amendment to the Commission’s inquiry.

The Commission may have its reasons for putting out such a cabined notice. But PFF believes that the failure to address, or at least to put on the table for others to address, the broader, more fundamental, issues raised above is a mistake. We understand that Congress purports to reaffirm some form of public interest obligation for television broadcasters and tosses the ball to the Commission to figure out what such obligation means. So, we understand that in

⁸ NOI, at para. 6.

⁹ NOI, at para. 34-38.

one sense the Commission might respond that it is just doing what Congress told it to do.

Nevertheless, in our view, any implementation of the public interest standard along the lines suggested by the Commission likely is unconstitutional for two reasons. First, in today's environment, public interest obligations that impact a broadcaster's discretion with regard to programming decisions almost certainly are inconsistent with the First Amendment. Second, the public interest standard itself likely is unconstitutional as a standardless delegation of legislative authority. These issues may not be resolved by the Commission in this first inquiry phase of the proceeding. But we do think it is necessary and appropriate that they be raised and debated. In that spirit, we address them below briefly, and we intend to continue to address them in the future.¹¹

III. NEEDED: A NEW FIRST AMENDMENT PARADIGM FOR THE DIGITAL AGE

At least since the landmark *Red Lion Broadcasting Co. v. FCC* decision in 1969, broadcasters have enjoyed less protection under the First Amendment than print and other media.¹² In *Red Lion*, the Supreme Court upheld against a First Amendment challenge the Commission's personal attack rules (a subset of the more generalized "Fairness Doctrine") which provided a person attacked on the air an opportunity to reply. While acknowledging that "broadcasting is clearly

¹⁰ NOI, at para. 22.

¹¹ PFF's Telecommunications Reform Project will publish a series of major papers on FCC reform, some of which will expand upon the points developed more briefly here.

¹² Compare *Red Lion Broadcasting co. v. FCC*, 395 U.S. 367 (1969), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

a medium affected by a First Amendment interest,”¹³ the Court nevertheless held that broadcasters were subject to a less stringent First Amendment standard than other media.

Throughout its opinion, the Court emphasized its view that the radio spectrum, at least at that point in time, was a “scarce resource.”¹⁴ According to the Court, “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”¹⁵ While intimating that “technological advances” might enable more broadcasters to use the spectrum in the future, thereby requiring a different result, the Court concluded that “[n]othing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated....”¹⁶

A second less predominant, but not unrelated, strain of reasoning was the notion that the requirement for a government license in and of itself lessened First Amendment protection. In this regard, the Court said:

A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license to monopolize a frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are

¹³ 395 U.S. at 386.

¹⁴ 395 U.S. at 391 (“scarce resource”), 394 (“scarce radio frequencies”), 400 (“scarcity of broadcast frequencies”), 401, note 28 (“even if there is no longer a technological scarcity of frequencies”).

¹⁵ 395 U.S. at 388.

¹⁶ 395 U.S. at 399.

representative of his community and which would otherwise, by necessity, be barred from the airwaves.¹⁷

Here the Court seems to be saying that it is the scarcity necessarily created by the licensing regime itself that justifies differential First Amendment treatment. In other words, it may be the fact Congress has seized ownership of the airwaves and prohibited private parties from broadcasting without a license that makes the licensee a “proxy or fiduciary” subject to government-prescribed programming strictures.¹⁸

Despite the fact that the number of broadcasting outlets has grown significantly since 1969 when the Supreme Court articulated the scarcity rationale,¹⁹ and the number of mass media outlets has increased even more dramatically as a result of the technological revolution, the Court has yet to abandon the differential First Amendment treatment of broadcasting. For example in 1990, in *Metro Broadcasting, Inc. v FCC*, the Court stated that it had

¹⁷ 395 U.S. at 389.

¹⁸ 395 U.S. at 394 (“Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them.”) To the extent that the *Red Lion* holding was based *per se* on the fact that the Government has asserted ownership of the spectrum resource, rather than the claimed physical scarcity of the resource, then it may be necessary for Congress to amend the Communications Act to redefine the property interest in spectrum in order to change *Red Lion*’s First Amendment jurisprudence. We do not propose to treat here this specific issue for Communications Act reform, although we are preparing a major paper on spectrum reform in connection with our Telecommunications Reform Project. For a very good summary of this issue, see *Time Warner Entertainment Co., LP v. FCC*, 1997 U. S. App. LEXIS 2016 (Suggestions for Rehearing *In Banc* Denied.) There Judge Williams concluded: “We would see rather serious First Amendment problems if the government used its power of eminent domain to become the only lawful supplier of newsprint and then sold the newsprint only to licensed persons, issuing the licenses only to persons that promised to use the newsprint for papers satisfying government-defined rules of content.”

¹⁹ The Court of Appeals decision which was reversed by the Supreme Court in *Red Lion* pointed out that in 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. *Radio Televisions News Directors Association v. United States*, 400 F.2d 1002, 1018 note 45 (7th Cir. 1968). In September 1999, the FCC reported there were 11,792 commercial radio and television stations. When noncommercial, translators, and low power stations (most of which didn’t exist in 1967) are included, the total is 24,505. Of course, while the number of broadcast stations has increased significantly since *Red Lion* was decided, there are even fewer daily newspapers published now. See Newspaper Association of America, Facts About Newspapers, <http://www.naa.org/info/facts/11.html>

“long recognized that ‘[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.’”²⁰

A few years later in the first *Turner Broadcasting* case concerning the Commission’s “must carry” rules, a majority of the Court said that “[i]n light of these fundamental technological differences between broadcasting and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.”²¹ Finally, in a plurality opinion in 1996, Justice Breyer referred to *Red Lion* as a decision “employing highly flexible standards in response to scarcity problems unique to over-the-air broadcast.”²²

This proceeding presents a good opportunity for the Commission to explain why it is no longer appropriate to accord broadcasters less than full First Amendment rights.²³ Indeed, the Commission should welcome the opportunity presented by this proceeding to articulate a new First Amendment paradigm for the digital age. This paradigm should recognize, on the one hand, that the diversity of sources of information made available by the proliferation of new technologies has rendered the *Red Lion* jurisprudence obsolete and, on the other hand, that any policy that attempts to apply differential programming

²⁰ 497 U. S. 547, 566-67 (1990). *Metro Broadcasting* affirmed the constitutionality of the FCC’s minority preference policies, but the Supreme Court overruled *Metro Broadcasting* in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

²¹ *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994).

²² *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2384 (1996).

²³ The Commission also should lay out the predicate in this proceeding for changes in the spectrum licensing regime set forth in the Communications Act, because it is this licensing regime, under which Congress retains “ownership” of the spectrum, that, at least to some extent, may provide the constitutional underpinning for differential treatment for all wireless disseminators of information.

requirements to similar media in the age of convergence constitutes unwise policy and is impractical.

A. The Scarcity Rationale Is No Longer Valid (Assuming It Ever Was)

Even before *Red Lion* was decided, economists had argued persuasively that spectrum was no more scarce than any other finite resource. In his classic article, Professor Coase showed that newsprint—a crucial input for newspaper publishers—or any other commodity (say, copper or computer screens) is subject to the same laws of economics as spectrum.²⁴

If the demand for newsprint exceeds the available supply, the price of newsprint will rise. Some newspapers will be able to pay the higher price for the scarce resource; others will not and will go out of business. Yet the government does not regulate the price of newsprint. As then-Professor Krattenmaker and Professor Powe bluntly put it: “The idea that the resources necessary to broadcast are inherently finitely limited, while those necessary to print are not, was not accurate even in 1943....”²⁵ It is a polite understatement to say that there is an abundance of scholarly criticism of the scarcity rationale.²⁶

Aside from the classical economics-based views of Professor Coase and others likening the “scarcity” of spectrum to that of other scarce resources used

²⁴ R. H. Coase, *The Federal Communications Commission*, 2 J. Law & Econ. 1, 18-20 (1959).

²⁵ Thomas G. Krattenmaker & Lucas A. Powe, Jr., REGULATING BROADCAST PROGRAMMING 208 (1994) (with 1943 referring to the year of Justice Frankfurter’s opinion in the *NBC* case in which he said “the radio spectrum is simply not large enough to accommodate everybody.” 319 U.S. at 213).

²⁶ For a good sampling of such criticism, see Lucas A. Powe, Jr., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 197-209 (1987). For a good short history and critique of the *Red Lion* jurisprudence, see Robert M. O’Neil, “Dead or Alive: How Long Will the Red Lion Specter Haunt Free Speech and Broadcasting?” in RATIONALES & RATIONALIZATIONS, REGULATING THE ELECTRONIC MEDIA 19 (Corn-Revere ed. 1997).

as inputs for other mass media, the fact of the matter is that “technological advances have largely, if not completely undermined the scarcity rationale of *Red Lion*—and the scarcity rationale long ago lost whatever intellectual patina of respectability it once possessed.”²⁷ The Commission itself has documented the monumental technological and industry changes that have occurred in the last two decades which have led to an abundance of speech outlets.

To appreciate the radically changed landscape, one only needs to peruse one of the recent *Video Programming* reports on the status of the video-programming marketplace. In the most recent report, the Commission found that, in addition to broadcasters, the following multichannel video programming distributors (“MVPDs”) compete to disseminate video information: cable systems, direct broadcast satellite operators, wireless cable systems, SMATV systems, local telephone companies, Internet video, home video sales and rentals, and electric utilities.²⁸

Rather than burdening the body of these comments with a repetition of the Commission’s findings, we are simply attaching as Exhibit A and incorporating by reference the “Introduction” section of the *1999 Video Programming Report*.²⁹ These pages detail the tremendous marketplace growth that has already taken place leading to a multiplicity of sources of information and which the Commission documents in the body of the report. And, looking to the future, it

²⁷ Ronald J. Krotosynski, Jr. *Into The Woods: Broadcasters, Bureaucrats, and Children’s Television Programming*, 45 Duke L. J. 1193, 1207 (1996).

²⁸ Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. No. 99-230, FCC 99-418, released January 14, 2000, at paras 1-16 (hereinafter *1999 Video Programming Report*.)

²⁹ See *1999 Video Programming Report*, at paras. 1-16, attached as Exhibit A. See 2000 Lexis 250, January 14, 2000.

was easy for the Commission to conclude that “[t]echnological advances that will permit MVPDs to increase both quantity of service (i.e., an increased number of channels using the same amount of bandwidth or spectrum space) and types of offerings (e.g., interactive services) continue.”³⁰

Indeed, in its recent Section 706 Report the Commission determined that increasing investment in facilities and services, coupled with a large number of new providers using diverse technologies, augers well for the availability of increasing bandwidth and the competitiveness of the broadband marketplace.³¹ The Section 706 Report contains extensive data in support of the Commission’s conclusion that broadband capability is being deployed on a “reasonable and timely basis.” Thus, the Commission had little difficulty in concluding that “as the demand for broadband capability increases, methods for delivering the digital information at high speeds to consumers are emerging in virtually all segments of the communications industry—wireline telephone, land-based (“terrestrial”) and satellite wireless, and cable, to name a few.”³²

In this radically changed technological and marketplace environment, the *Red Lion* scarcity rationale no longer makes sense.

B. Technological Convergence Has Rendered Differential First Amendment Treatment Obsolete

Aside from rendering the scarcity rationale archaic, the convergence brought about by the digital revolution is another reason the *Red Lion* paradigm

³⁰ 1999 Video Programming Report.

³¹ Inquiry Concerning the Deployment of Advanced Telecommunications Services to All Americans, 14 FCC Rcd 2398 (1999).

³² *Id.*, at para. 4.

is obsolete. The Commission's *NOI* mistakenly stops short of inquiring about the implications of the changes wrought by the convergence of digital technologies.

But the digital revolution simply can't be ignored. Obviously, it is rapidly becoming increasingly difficult in the age of the Internet and other digital technologies to differentiate the "programming" that we receive through what we may continue to call our "computer" screens and our "television" screens. Again, it would burden these comments unnecessarily to recite here all the evidence for this phenomenon. It should suffice to point to the Commission's own recent examination in the *1999 Video Programming Report*.

The Commission determined that "[m]edia companies continue to offer increasing amounts of video over their Web sites in the expectation that the pictures will be acceptable for the intended use or eventually improve to broadcasting or VCR quality."³³ Indeed, so much so that the report has a whole section entitled "Internet video." The Commission begins that section by observing that, even in the last year, "real-time and downloadable video accessible over the Internet ("Internet video") has become widely available."³⁴ In fact, according to the Commission, in the past year:

Streaming content has become common on many Web pages. In addition, many Web pages are specifically designed to offer Internet audio and video. For example, Broadcast.com, which refers to itself as an "Internet broadcast network," expanded its offerings in 1998 and the first half of 1999. Broadcast.com offers connectivity to live radio and television broadcasts featuring business and sporting events, full-length CDs, concerts, news, audio books, and various other audio and visual options.

³³ *1999 Video Programming Report*, at para. 15.

³⁴ *Id.*, at 110.

BreakTV.com, iCast, TV on the Web, and Den TV.com, also offer numerous content selections.³⁵

And that is not all. The Commission goes on to offer even more specific evidence to show that “[b]roadcast and non-broadcast networks are offering increased amounts of streaming video.”³⁶ For example, the Commission notes that ABC news launched a thrice-weekly webcast anchored by none other than Sam Donaldson.

Although the FCC concluded in its *1999 Video Programming Report* that, despite its rapid growth, Internet video is not yet seen as a direct competitor to traditional video services, no one seriously expects that this will remain the case for long. There is a reason why “Broadcast.com,” “BreakTV.com,” and “TV on the Web” chose those names. With the availability of set-top box technologies which allow the provision of “Internet video” over a “television,” the Commission should take the lead in recognizing that the old regulatory labels are obsolete. Consumers simply are not going to care what one calls the digital devices through which they receive their information or understand differential content regulations for what, in effect, appears to be the same service.

Indeed, convergence is behind proposals such the AOL/Time Warner merger. As a Wall Street Journal article put it: “The engine of the deal may be a much simpler strategy: packaging television, telephone and Internet services into

³⁵ Id., at 113.

³⁶ Id., at para. 114.

one bundle... Bundling all of that on a single network has become a central strategy of the country's biggest telecom and Internet companies."³⁷

Obviously, a regime which subjects speech to differential First Amendment treatment based on the label given to the viewer's screen ("TV", "computer," "Palm Pilot"), or on the medium through which one image or another in a bundle of services was transmitted, makes no common or constitutional sense, and it is not long for this world. As far back as May 1995, in the pre-WWW days, then-Professor Krattenmaker and Professor Powe wrote that:

As communications technologies converge, it will be impossible for the Supreme Court to continue to rely on its bipolar (or tripolar) print-broadcasting models. Which of these models "fits" pictures transmitted though cable TV lines, satellites, microwave? (In fact, today some television viewers watch programs that, in traveling from producer to the home, have traveled part of that distance on each of these media.) And which of these models fits a scholarly journal that is electronically created and transmitted and only placed on a printed page if some recipient so chooses? Would newspapers and magazines suddenly come within the scope of content regulation if they were electronically transmitted to their subscribers.³⁸

The very next year, in a concurring opinion in the *Denver Area* cable television case, Justice Souter put it this way: "[A]s broadcast, cable, and the cybertechnology of the Internet and its World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others."³⁹

³⁷ "Does Everybody Have To Own Everything?" Wall Street Journal, January 12, 2000, p. B1.

³⁸ Krattenmaker and Powe, *Emerging Media Technology and the First Amendment: Converging first Amendment Principles for Converging Communications Media*, 104 Yale L. J. 1719 (1995).

³⁹ *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2402 (1996).

Differential treatment for the content of wireless information disseminators no longer makes any sense as a matter of policy. And it is almost inconceivable that the Commission would consider imposing on "Internet video" providers, under the public interest standard, the same type of content requirements that it proposes for broadcasters. It would be very unsound policy for the Commission to try to bring these new technologies within the ambit of the public interest standard. And certainly any attempt to regulate the programming of Internet video and similar services would be unconstitutional.⁴⁰ Thus, in a proceeding at the heart of the digital convergence revolution, the Commission simply can't ignore the question whether any proposed content requirements are consistent with the First Amendment.

Accordingly, we urge the Commission not to pretend nothing has changed. Rather, it should use this proceeding to articulate a new deregulatory paradigm for the digital age, one in which all media, regardless of the technology used for information dissemination, enjoy the same First Amendment freedom.

IV. THE PUBLIC INTEREST STANDARD CONSTITUTES A STANDARDLESS DELEGATION OF AUTHORITY BY CONGRESS WHICH LIKELY IS UNCONSTITUTIONAL

Over three hundred years ago, writing in the second of his famous Two Treatises of Government, John Locke said that the legislature "cannot transfer the power of making laws to any other hands. For it being but a delegated power

⁴⁰ See *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

from the people, they who have it, cannot pass it over to others.”⁴¹ In the summer of 1787, the Founders relied heavily on their understanding of Locke, and, of course, on Montesquieu, in devising a constitution based on separation of powers.⁴² Thus, they wrote in Article I that “all legislative Powers herein granted shall be vested in a Congress of the United States.”

While Article I remains unchanged to this day, since 1787 there's been a lot of water under the constitutional bridge regarding separation of powers doctrine. So much so that perhaps there no longer are any constitutional limits on Congress's ability to delegate its authority to an agency to act on its behalf. But in an inquiry concerning the extent of the Commission's authority to make far-reaching decisions concerning the regulation of program content under a standard as indeterminate as the “public interest,” it may be worth asking, how we got to this point. And, whether—in a constitutional sense—we must remain stuck here. If nothing else, this proceeding presents an opportunity to begin a dialog on this subject.

In 1892, in *Field v. Clark*, the Supreme Court said rather straightforwardly: “That Congress cannot delegate legislative power...is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”⁴³ The rationale for the nondelegation doctrine, of course, is that the fundamental policy decisions in a representative democracy

⁴¹ John Locke, TWO TREATISES OF GOVERNMENT 362 (P. Lasslett ed. 1960).

⁴² In *Federalist No. 47*, Madison invokes “the celebrated Montesquieu” as the “oracle who is always consulted” on the subject of separation of powers. *The Federalist Papers*, at 301 (J. Madison) (C. Rossiter ed. 1961). Madison quotes extensively from Montesquieu in No. 47, including Montesquieu's famous statement that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty...” *Id.*, at 303.

⁴³ 143 U.S. 649, 692 (1892).

should be made by the people's elected representatives. And, as an important corollary, that if Congress can transfer its power to another branch, the Constitution's efforts to keep power diffused among the branches will be frustrated.

The early nondelegation cases, such as *Field v. Clark*, adopted a formalistic approach in that they focused simply on whether the delegated authority was, in fact, "legislative." If so, such delegation was unconstitutional. But by 1928 there was a shift in the analytical framework. In *J. W. Hampton, Jr. v. United States*, in a case challenging the administration by the President of a tariff established by Congress, the Court announced a new delegation standard: the delegation would be upheld if the statute set forth "an intelligible principle" to guide the entity to which the authority is delegated.⁴⁴

Since then, of course, the Supreme Court has found delegations to be unconstitutional in only two New Deal cases, both involving the National Industry Recovery Act ("NIRA").⁴⁵ In *Schechter Poultry*, the Court invalidated the "Live Poultry Code" adopted under a NIRA provision authorizing the President to promulgate "codes of fair competition" for various trade sectors. Under the statute, the President could impose virtually any condition or requirement on industry "in his discretion." Typically, in formulating the codes, the President fixed the number of hours in the work week, minimum wages, and other trade practices, such as, in the case of the poultry code, acceptable chicken-killing methods.

⁴⁴ 276 U. S. 394, 401 (1928).

In the throes of the Depression, the Court recognized NIRA's beneficent purpose. But it concluded nevertheless that "Congress cannot delegate legislative power to the President to exercise unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation or expansion of trade or industry."⁴⁶ The Court said it recognized the need for Congress to adapt legislation "to complex conditions involving a host of details with which the national legislature cannot deal directly, but, "if our constitutional system is to be maintained," Congress itself must not be permitted "to transfer to others the essential legislative functions with which it is thus vested."⁴⁷

Post-*Schechter*, with the quick rise of the regulatory state, the nondelegation doctrine fell out of fashion. So much so that in 1989 Justice Scalia remarked: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?"⁴⁸ While Justice Scalia concluded that the nondelegation doctrine is not readily enforceable by the courts, he also had this to say:

It is difficult to imagine a principle more essential to democratic government than that which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.⁴⁹

⁴⁵ See *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

⁴⁶ 295 U.S. at 537-38.

⁴⁷ 295 U.S. at 529-530.

⁴⁸ 488 U.S. 361, 416 (1989)(dissenting)(citing *National Broadcasting Co. v. United States*, 319 U.S.190, 216-17 (1943).

We are aware that Justice Frankfurter declared in *FCC v. Pottsville Broadcasting Co.* that the Communications Act's "public interest" criterion "is as concrete as the complicated factors for judgment in such a field of delegated authority permit."⁵⁰ He assumed that "[t]here will be no withdrawal from these experiments...[because]...our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."⁵¹

Perhaps so. But while acknowledging the very considerable leeway that the Court has granted Congress in delegating its legislative authority, it is not inappropriate to ask anew whether the "public interest" is indeed sufficiently "concrete." What are the "intelligible principles" that one derives from the standard? A standard so vague that it can mean whatever three FCC Commissioners say it means on any given day contains no intelligible principle.

If this is correct, then one set of three commissioners may determine this year that the public interest requires that, sixty days before an election, broadcasters make available one hour a day of free air time for campaign commercials, while next year another set (or the same three) may decide otherwise. Or, in light of shootings at schools, three commissioners may decide the public interest requires an hour per day of teen-oriented educational programming, and three others (or the same three) may decide that all shows with "gratuitous" violence must be broadcast after 10:00 p.m. Three commissioners may mandate that licensees broadcast one hour of programming

⁴⁹ 488 U.S. at 415.

⁵⁰ 309 U.S. 134, 138 (1940).

a week that truly reflects the diversity of American culture, however the three define “diversity” or “American culture.” And on and on. It should not be too much to ask that when Congress delegates authority, there be some more “intelligible principle” at work than the rule of three.⁵²

PFF urges that a reexamination of the constitutionality of the public interest standard begin here, in a proceeding that ought by all rights to be forward-looking. Constitutional understanding does change—witness the evolution of the application of the nondelegation doctrine itself. Recently, there has been more willingness on the part of courts to entertain nondelegation claims,⁵³ and on the part of commentators to argue vigorously for its revival.⁵⁴

In today’s radically different and competitive communications environment, Congress ought to take it upon itself to replace the public interest standard with intelligible guidance. If Congress fails to do so, it is quite possible that one day in the future, the courts may call Congress to task.

The courts may conclude that, after all, it is not too much to ask that in a representative democracy, one with separation of powers squarely at its

⁵¹ 309 U.S. at 142 note 4, quoting Elihu Root.

⁵² We understand that, in response to the argument here, it may be contended that sensitivity to First Amendment concerns dictates that Congress not be more specific in its delegation. In other words, that it would be inappropriate for Congress to set forth more specific guidance concerning the types of programming the agency should mandate. For the reasons discussed in Section III above, we agree that the First Amendment precludes either Congress—or the Commission—from adopting requirements that affect program content. The completely indeterminate nature of the public interest delegation raises separate and independent constitutional concerns.

⁵³ See, e.g., *American Trucking Associations, Inc.*, 175 F. 3d 1027 (D.C. 1999), rehearing denied, 195 F. 3d 4 (1999). There the court remanded an EPA decision to the agency to give the agency a chance to discern whether a Clean Air Act provision contains an “intelligible principle.” See also *Industrial Union Dep’t, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-46 (1980); *International Union, UAW v. OSHA*, 938 F. 2d 1310, 1317 (D.C. Cir. 1991), for cases considering the nondelegation doctrine.

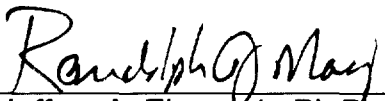
⁵⁴ See, e.g., David Schoenbrod, *POWER WITHOUT RESPONSIBILITY-HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (Yale University 1993); Lawson, *Delegation and the Constitution*, Regulation, Volume 22, No. 2, at 23.

foundation, lawmakers assume the responsibility for making basic policy judgments, even if at a rather high level of generality. Then it will be possible for the people to have a basis on which to hold their representatives accountable.

V. CONCLUSION

For the foregoing reasons, the Commission should act in a manner consistent with the views stated herein.

Respectfully submitted,


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APPENDIX A

2000 FCC LEXIS 250, *

In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming

CS Docket No. 99-230

FEDERAL COMMUNICATIONS COMMISSION

2000 FCC LEXIS 250

RELEASE-NUMBER: FCC 99-418

January 14, 2000 Released; Adopted December 30, 1999

ACTION: [*1] SIXTH ANNUAL REPORT

JUDGES:

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement; and Commissioner Tristani issuing a statement

OPINION:

I. INTRODUCTION

1. Section 628(g) of the Communications Act of 1934, as amended ("Communications Act"), requires the Commission to report annually to Congress on the status of competition in markets for the delivery of video programming. n1 Congress imposed this annual reporting requirement in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") n2 as a means of obtaining information on the competitive status of markets for the delivery of video programming. n3 This is the Commission's sixth annual report ("*1999 Report*") submitted pursuant to Section 628(g) of the Communications Act. n4

A. Scope of this Report

n1 Communications Act of 1934, as amended, § 628(g), 47 U.S.C. § 548(g).

n2 Pub.L. No. 102-385, 106 Stat. 1460 (1992).

n3 The 1992 Act imposed a regulatory scheme on the cable industry designed to serve as a transitional mechanism until competition develops and consumers have adequate multichannel video programming alternatives. One of the purposes of Title VI of the Communications Act, Cable Communications, is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 447 U.S.C. § 521(6). [*2]

n4 The Commission's previous reports appear at: Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), CS Docket No. 94-48, First Report ("*1994 Report*"), 9 FCC Rcd 7442 (1994); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, Second Annual Report ("*1995 Report*"), 11 FCC Rcd 2060 (1996); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133, Third Annual Report ("*1996 Report*"), 12 FCC Rcd 4358 (1997); Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, Fourth Annual Report ("*1997 Report*"), 13 FCC Rcd 1034 (1998); and Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102, Fifth Annual Report ("*1998 Report*"), 13 FCC Rcd 24284 (1998).

2. In this *1999 Report*, we update the information [*3] in our previous reports and provide data and information that summarizes the status of competition in markets for the delivery of video programming. The information and analysis provided in this report are based on publicly available data, filings in various

Commission rulemaking proceedings, and information submitted by commenters in response to a *Notice of Inquiry* ("Notice") in this docket. n5 To the extent that information provided in previous annual reports is still relevant, we do not repeat that information in this report other than in an abbreviated fashion, and provide references to the discussions in prior reports.

n5 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 99-230, Notice of Inquiry ("Notice"), 14 FCC Rcd 9617 (1999). Appendix A provides a list of commenters.

3. In Section II, we examine the cable television industry, existing multichannel video programming distributors ("MVPDs") and other program distribution technologies and potential competitors to cable television. Among the MVPD systems or techniques discussed are direct broadcast satellite ("DBS") [*4] services and home satellite dishes ("HSDs"), wireless cable systems using frequencies in the multichannel multipoint distribution service ("MMDS") and the instructional television fixed service ("ITFS"), private cable or satellite master antenna television ("SMATV") systems as well as broadcast television service. We also consider other existing and potential distribution technologies for video programming, including the Internet, home video sales and rentals, local exchange telephone carriers ("LECs"), and electric and gas utilities. We include these services and providers because they offer, or may offer, video programming or video programming in conjunction with nonvideo services.

4. In Section III of this report, we examine market structure and competition. We evaluate horizontal concentration in the multichannel video marketplace and vertical integration between cable television systems and programming services. We also discuss competitors serving multiple dwelling unit ("MDU") buildings. We further address programming issues and technical advances. In Section IV, we examine a limited number of cases where consumers have a choice between an incumbent cable operator and another [*5] MVPD in a specific market and report on the effects of this entry.

B. Summary of Findings

5. In the *1999 Report*, we examine the status of competition in markets for the delivery of video programming, discuss changes that have occurred in the competitive environment over the last year, and describe barriers to competition that continue to exist. Overall, the *Report* finds that competitive alternatives and consumer choices continue to develop. Cable television still is the dominant technology for delivery of video programming to consumers in the MVPD marketplace, although its market share continues to decline. As of June 1999, 82% of all MVPD subscribers received their video programming from a local franchised cable operator, compared to 85% a year earlier.

6. The total number of subscribers to both cable and noncable MVPDs continues to increase. A total of 80.9 million households subscribed to multichannel video programming services as of June 1999, up 5.5% over the 76.6 million households subscribing to MVPDs in June 1998. This subscriber growth accompanied a 3.2 percentage point increase in multichannel video programming distributors' penetration of television households [*6] to 81.4% as of June 1999.

7. Since the *1998 Report*, the number of cable subscribers continued to grow, reaching 66.7 million as of June 1999, up almost 2% over the 65.4 million cable subscribers in June 1998. The total number of noncable MVPD households grew from 11.2 million as of June 1998 to 14.2 million homes as of June 1999, an increase of 26%.

8. Much of the increase in the growth of noncable MVPD subscribers is attributable to the growth of DBS. DBS appears to attract former cable subscribers and consumers not previously subscribing to an MVPD. Between June 1998 and June 1999, the number of DBS subscribers grew from 7.2 million households to 10.1 million households. DBS subscribers now represent 12.5% of all MVPD subscribers. There also have been a number of additional cable overbuilds in the last year. While the Commission has certified new open video systems, some OVS operators have converted portions of their systems to franchised cable operations. Over the last year, the number of subscribers to and market shares of HSD and MMDS subscribers continued to decline. However, the number of SMATV subscribers has increased this year,

reversing a decline exhibited the previous [*7] year.

9. During the period under review, cable rates rose faster than inflation, although the difference between the cable price index and the Consumer Price Index ("CPI") is not as great as in the previous year. According to the Bureau of Labor Statistics, between June 1998 and June 1999, cable prices rose 3.8% compared to a 2% increase in the CPI, which measures general price changes. Concurrently with these rate increases, capital expenditures for the upgrading of cable facilities increased (up 13.2% over 1998), the number of video and nonvideo services offered increased, and programming costs increased (license fees increased by 14.6% and programming expenses increased by 16.3%). In addition, the increase in labor costs in the communications industry is reported to exceed the increase in labor costs for all industries combined by almost 2%. We note that during this period, on March 31, 1999, rates for cable programming service tiers ("CPSTs") were deregulated by Congress.ⁿ⁶ We also note that cable operators' pricing decisions may be affected where direct competition exists. Available evidence indicates that when an incumbent cable operator faces head-to-head competition, it responds [*8] in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming.

ⁿ⁶ See Sections 623(c)(3) and (c)(4); 47 U.S.C § 543(c)(3) and (c)(4).

10. The Telecommunications Act of 1996 ("1996 Act")ⁿ⁷ removed barriers to LEC entry into the video marketplace in order to facilitate competition between incumbent cable operators and telephone companies. For example, the 1996 Act repealed a statutory prohibition against an entity holding attributable interests in a cable system and a LEC with overlapping service areas. At the time of the 1996 Act's passage, it was expected that local exchange telephone carriers would begin to compete in video delivery markets, and cable operators would begin to provide local telephone exchange service. Since the *1998 Report*, there has been an increase in the amount of video programming provided to consumers by telephone companies, although the expected technological convergence that would permit use of telephone facilities for video service has not yet occurred. Ameritech now holds 111 [*9] cable franchises and reports that it serves approximately 250,000 subscribers. BellSouth has received cable franchises in 21 areas with the potential to pass 1.4 million homes in addition to its right to provide MMDS service to approximately 3.5 million homes. Other LECs, including GTE, SNET, and U S West, also provide cable television service in a number of areas. As reported last year, Bell Atlantic and SBC have joint marketing agreements with DirecTV in order to offer video service to their telephone customers in some areas. While the 1996 Act created the OVS framework as a means of entry into the video marketplace by LECs, few telephone companies have sought certification. Alternatively, only a limited number of cable operators have begun to offer telephone service, and such service uses traditional telephone switching equipment rather than cable facilities. However, cable operators are beginning to develop and test Internet Protocol ("IP") telephony. The potential to provide telephone service prompted several large transactions over the past year, most notably AT&T's purchase of Telecommunications, Inc. ("TCI").

ⁿ⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). [*10]

11. Since the *1998 Report*, the most significant convergence of service offerings has been the pairing of Internet service with other service offerings. There is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access. Cable operators continue to expand their broadband infrastructure that permits them to offer high-speed Internet access. Currently, the most popular way to access the Internet over cable is through the use of a cable modem and personal computer. A small portion of cable Internet access is delivered through a television receiver rather than a personal computer. Many cable operators also are planning to integrate telephony and high-speed data access. Like cable, the DBS industry is developing ways to bring advanced services to their customers. For example, Hughes Network Systems, Inc., parent of DirecTV, offers a satellite-delivered Internet access service ("DirecPC") with a telephone return path. EchoStar and OpenTV, Inc., a company that produces interactive television technology, plan to offer e-mail, e-commerce, and on-line banking services in the next year. [*11] SMATV operators are also beginning to offer local and long distance telephone service and Internet access along with video service. In addition, a few MMDS operators are offering Internet service.

12. The data provided in this *Report* suggest that companies comprising several different segments of the communications industry are seeking to provide combinations of services to consumers, including video, voice, and data. In this context, we believe it is appropriate to compare the cable industry with other communications industry segments that currently provide, or plan to provide, such combinations of services. Specifically, we find that the cable television industry holds a relatively small market share compared to other communications industry segments that offer or intend to offer video, voice, and data services. For example, in 1998, the total revenue for these segments of the communications industry (i.e., cable television, MMDS, DBS, television broadcasting, long distance telephone, and local telephone) was \$ 334 billion. Of this total, cable operators represented 12.3% of the communications industry's revenues.

13. Noncable MVPDs continue to report that regulatory and other [*12] barriers to entry limit their ability to compete with incumbent cable operators and to thereby provide consumers with additional choices. Noncable MVPDs also continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators. In multiple dwelling units ("MDUs"), potential entry may be discouraged or limited because an incumbent video programming distributor has a long-term and/or exclusive contract. Other issues also remain with respect to how, and under what circumstances, existing inside wiring in MDUs may be made available to alternative video service providers.

14. In addition, consumers have historically reported that their inability to receive local signals from DBS operators may negatively affect their decision as to whether to subscribe to DBS. The Commission previously recommended that legislation be enacted to remove barriers to DBS carriage of local broadcast signals. On November 29, 1999, a revised Satellite Home Viewer Act ("SHVA") was signed into law, permitting satellite providers to distribute local broadcast signals within their [*13] local television markets. n8 On that date, DBS operators began offering local broadcast stations in some markets, and reported plans to provide local broadcast stations to a significant portion of U. S. households within the next few months. The Commission hopes that the revised SHVA will have a significant and positive effect on MVPD competition. We expect that DBS operators will now offer a programming package more comparable to and competitive with the services offered by cable operators. We further believe that increased competition is the best way to keep cable rates reasonable and in check. Moreover, the Commission plans to aggressively implement the new SHVA in order to facilitate consumer choice in the MVPD marketplace.

n8 Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

15. Our findings as to particular distribution mechanisms operating in markets [*14] for the delivery of video programming include the following:

[] Cable Systems: Since the *1998 Report*, the cable television industry has continued to grow in terms of subscribership (up to 66.7 million subscribers as of June 1999, a 2% increase from June 1998), channel capacity (some operators now offer over 170 video channels), number of national satellite-delivered video programming services (up to 283 services by June 1999 from 245 in June 1998, a 16% increase), revenues (an approximate 8% increase between June 1998 and June 1999), audience ratings (non-premium cable viewership rose from a 39 share at the end of June 1998 to a 42 share at the end of June 1999), and expenditures on programming (an approximate 15% increase in program license fees paid by cable system operators).

[] The cable industry remains healthy financially, which has enabled it to invest in improved facilities, either through upgrades or rebuilding. As a result, there have been increases in channel capacity, the deployment of digital transmissions that provide better picture quality than can be offered through analog service, and nonvideo services, such as Internet access. Cable operators also offer telephony, [*15] although the use of integrated facilities remains primarily experimental with limited exceptions.

[] Direct-to-Home ("DTH") Satellite Service (DBS and HSD): Video service is available from high power DBS satellites that transmit signals to small DBS dish antennas installed at subscribers' premises, and from medium and low power satellites requiring larger satellite dish antennas. In the last year, DirecTV merged with United States Satellite Broadcasting Co., Inc. ("USSB") and acquired PrimeStar. There are over ten million DBS subscribers (EchoStar, DirecTV, and PrimeStar's subscribers being transitioned to DirecTV's service), an increase of approximately 39% since the *1998 Report*. Between June 1998 and June 1999, the number of HSD subscribers, measured as the number of HSD users that actually purchase programming packages, declined from 2 million to 1.8 million, a decrease of 12%, that is likely due to subscribers switching to DBS. DirecTV and EchoStar are among the ten largest providers of multichannel video programming service. DBS represented a 12.5% share of the national MVPD market in June 1999 and HSD represented another 2.2% of that market.

[] Wireless Cable Systems: Currently, [*16] the wireless cable industry ("MMDS") provides competition to the cable industry in only limited areas. MMDS subscribership fell from 1.0 million subscribers to 821,000 subscribers between June 1998 and June 1999, a decrease of 17.9%. Analysts state that the advent of digital MMDS and the Commission's authorization of two-way MMDS service will make high-speed Internet and telephony possible and have the potential to foster renewed MMDS growth. Wireless cable represented a 1% share of the national MVPD market in June 1999.

[] SMATV Systems: SMATV systems use some of the same technology as cable systems, but do not use public rights-of-way, and focus principally on serving subscribers living in multiple dwelling units ("MDUs"). SMATV subscribership has increased 54% since the last report, with the industry representing an approximately 1.8% share of the national MVPD subscribership as of June 1999. Upgraded facilities, and expanded service offerings to include DBS programming, Internet access, telephone service, and security services, have fostered SMATV growth.

[] Broadcast TV: Broadcast networks and stations are competitors to MVPDs in the advertising and program acquisition markets [*17] and supply video programming directly to the approximately 20% of television households that are not MVPD subscribers. Additionally, broadcast networks and stations are suppliers of content for distribution by MVPDs. Since the *1998 Report*, the broadcast industry has continued to grow in the number of operating stations (from 1583 in 1998 to 1599 in 1999) and in advertising revenues (\$ 34.6 billion in 1998, a 6.7% increase over 1997). While audience levels have declined in the last year, the four major television broadcast networks still account for a 52% share of prime time television viewing for all television households. Broadcast television stations continue to deploy digital television ("DTV") service. There are 111 television stations on the air broadcasting DTV signals and digital simulcasts of some programming have begun.

[] LEC Entry: The 1996 Act expanded opportunities for LECs to enter markets for the delivery of multichannel video programming. As noted in previous reports, LECs do not yet represent a national presence in the MVPD market. The competitive presence of LECs in specific video markets, however, is growing. In certain areas, especially in the midwest, LECs [*18] are already or are becoming significant regional competitors. Particularly notable are the efforts of Ameritech as a cable overbuilder and BellSouth as an overbuilder and MMDS operator. Ameritech has acquired 111 cable franchises, potentially passing more than 1.7 million homes. Ninety of these cable franchises are operational, in whole or in part, and they serve at least 250,000 subscribers. BellSouth has acquired cable franchises in 18 areas, with the potential to pass 1.2 million homes, and is launching digital MMDS service in a number of areas. In previous reports, we noted that, while LECs were not yet a national competitor, their competitive presence was growing. It now appears that their rate of entry into the MVPD marketplace may be slowing.

[] Open Video Systems: In the 1996 Act, Congress established a new framework for the delivery of video programming -- the open video system ("OVS"). Under these rules, a LEC or other entrant may provide video programming to subscribers, although the OVS operator must provide non-discriminatory access to unaffiliated programmers on a portion of its channel capacity. The Commission has certified 13 OVS operators to serve 28 areas. RCN owns [*19] the only operating open video systems and currently serves areas surrounding Boston, New York City, and Washington, D.C. In several areas for which it holds OVS

certifications, or portions of these areas, RCN has converted its systems to franchised cable systems. Between June 1998 and June 1999, the number of OVS subscribers went from approximately 66,000 to 60,000, a decline attributed to the conversion of some OVS operations to cable service. OVS subscribers now represent slightly less than 1% of all MVPD subscribers. As a result of litigation that was resolved in January 1999, one of the major advantages for an entity choosing the OVS mode of regulation - the absence of any need for a traditional cable television franchise - may no longer exist.

[] Internet Video: By June, 1999 there were an estimated 50 million households with personal computers and over 100 million Americans were Internet users. Previously, we reported on the availability of software technologies that make real-time and downloadable audio and video from the Internet accessible through a personal computer. We also noted that there are technologies available for the provision of Internet video over a television [*20] using set-top box Internet access. As of June 1999, investment and development of Internet video services was continuing, though video pictures offered by Internet video still remain less than broadcast quality. Media companies continue to offer increasing amounts of video over their Web sites in the expectation that the pictures will be acceptable for the intended use or eventually improve to broadcasting or VCR quality.

[] Home Video Sales and Rentals: Video cassettes, laser discs, and digital video discs ("DVDs") provide feature films similar to those distributed by cable operators on premium channels and others involved in the distribution of video programming. The number of homes with DVD players has grown rapidly in the two years since this technology was introduced. About two million homes have DVD players and about the same number have laser disc players, far less than the 82% of all households with VCRs. Most new home video programming available for sale or rental, including movies, documentaries and concerts, is released in VCR, laser disc, and DVD formats. Recently a new home video technology, the personal video recorder ("PVR") has been introduced. A PVR can pause, rewind, [*21] and perform slow motion and instant replay of a live program, thereby allowing a viewer to watch earlier portions of a program while later portions of the program are still being broadcast. A PVR is intended for use with a service that provides an onscreen programming guide service through a telephone connection. This technology can be used to create a personal menu and can learn to record in accordance with a viewer's television preferences.

[] Electric Utilities: Utilities are not yet major competitors in the telecommunications or cable markets, but they possess characteristics that could potentially help them become competitively significant in the cable market. Some may already possess fiber-optic networks throughout the public rights-of-way in the areas they serve. In the last year, several utilities have announced, commenced, or moved forward with ventures involving multichannel video programming distribution. Starpower, a joint venture between RCN and PEPCO, has begun to offer video, telephone, and Internet services in the Washington, D.C. area. Seren, a wholly-owned subsidiary of Minneapolis-based Northern States Power, is currently offering cable and high-speed data access [*22] as an overbuilder in several Minnesota communities and plans to expand its service. Others, including several municipal utilities in Iowa, the municipal utility in Lebanon, Ohio, and Millennium Telecom, which is partially owned by Tri-County Electric Cooperative in Texas, have begun or plan to begin video and other services to their customers.

16. We also find:

[] Consolidations within the cable industry continue as cable operators acquire and trade systems. The seven largest operators now serve almost 90% of all U.S. cable subscribers. However, in terms of one traditional economic measure, national concentration among the top MVPDs has declined since last year. n9 DBS operators DirecTV and EchoStar rank among the ten largest MVPDs in terms of nationwide subscribership along with eight cable multiple system operators ("MSOs"). As a result of acquisitions and trades, cable MSOs have continued to increase the extent to which their systems form regional clusters. Currently, 40.4 million of the nation's cable subscribers are served by systems that are included in regional clusters. By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision [*23] of cable and other services, such as telephony.

n9 Traditional economic measures (e.g., the Herfindahl-Hirschman Index or HHI) are based on market shares or the squaring of market shares such that large companies are weighed more heavily than small

companies. The HHI (and apparent levels of concentration) decline with rising equality among any given number of companies in terms of market shares even if these firms individually have larger shares of the markets.

[] The number of satellite-delivered programming networks has increased from 245 in 1998 to 278 in 1999. Vertical integration of national programming services between cable operators and programmers, measured in terms of the total number of services in operation, declined from last year's total of 39% to 36% this year, continuing a five year trend. However, in 1999, one or more of the top six cable MSOs held an ownership interest in each of 101 vertically integrated national programming services. Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDs. The *Report* identifies 75 regional networks, 26 of which are sports channels, many owned at least in part [*24] by MSOs. There are also 30 regional and local news networks that compete with local broadcast stations and national cable networks (e.g., CNN).

[] The program access rules adopted pursuant to the 1992 Cable Act were designed to ensure that alternative MVPDs can acquire, on non-discriminatory terms, vertically-integrated satellite delivered programming. We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We will continue to monitor this issue and its impact on the competitive marketplace.

[] Technological advances that will permit MVPDs to increase both quantity of service (i.e., an increased number of channels using the same amount of bandwidth or spectrum space) and types of offerings (e.g., interactive services) continue. In particular, cable operators and other MVPDs continue to develop and deploy advanced technologies, especially digital compression, in order to deliver additional video options and other services (e.g., data access, telephony) to their customers. To access these wide ranging services, [*25] consumers use "navigation devices." In the last year, on reconsideration, the Commission made some modifications to the rules and policies adopted to implement Section 629 of the Communications Act, which is intended to ensure commercial availability of these navigation devices. The cable industry reports that it is making steady progress towards the development of specifications to separate out security and non-security functions for the interoperability of digital set-top boxes by July 1, 2000, as required by the rules. Interface requirements and a certification process for the high-speed cable modems needed to access data services have also been developed. When these processes are complete, additional competition in the market for equipment used by subscribers should be possible.